IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1566 OF 2007

Abdul Hassan Khan)
Proprietor of M/s Garib Nawaz Corporation)
Adult, Indian Inhabitant, having his office)
at Shop No.31, Kohinoor Coop Society)
Link Road, Saki Naka, Andheri (E))
Mumbai-400 072)..Petitioner

Versus

1. State of Maharashtra,)
through Ministry for Animal Husbandry,)
Dairy Development and Fisheries, having,)
their offices at Mantralaya)
Mumbai-400 032.)

2. The Hon`ble Minister,)
Ministry for Animal Husbandry,)
Dairy Development and Fisheries, having,)
their offices at Mantralaya, Govt of Mah.)
Mumbai-400 032.)

Respondents

Mr Bipin Joshi for the petitioner.

Mrs. Geeta Shastri, Assistant Government Pleader, for respondent No.1

Mr Nitin Pradhan with Ms. S.D. Khot for respondent No.2

CORAM: SWATANTER KUMAR, C.J. &
DR D.Y.CHANDRACHUD, J.

Judgment reserved on : September 5, 2007
Judgment delivered on: September 20, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

Rule. Respondents waive service. By consent Rule made returnable forthwith. Heard learned counsel for the parties.

1. By this petition under Article 226 of the Constitution of India, the petitioner prays for quashing of the order dated 17th July 2007 passed by respondent No.2, whereby the contract for recovery of entrance fee from vehicle drivers, who enter from three check nakas of Goregaon, Powai and Marol respectively in Aarey Milk Colony has been extended for a period of 3 years with effect from 17th February 2005 by increasing the contract amount by 5% as also inviting fresh tenders for the said contract.

2. The petitioner, who claims to be a reputed contractor and who has undertaken various contracts for management and maintenance, submitted a tender in response to the notice dated 30th December 2001 inviting tenders issued by the State Government. The tender related to the management of three toll naka points within the Aarey Milk Colony, Goregaon (East) Mumbai. In response to the said notice, the tender of the petitioner was accepted and he was awarded

contract work for a period of three years from 17th February 2002 to 16th February 2005. Three years period expired on 17th February 2005. Thereafter an application was moved by the petitioner requesting respondent No.2 to grant extension of the contract for a period of three years. This request of the petitioner was accepted by respondent No.2, vide order dated 24th April 2004. It is averred in the petition that earlier a writ petition being Writ Petition No.687 of 2002 was filed which was withdrawn. The said order dated 24th April 2002 granting three years extension to the petitioner on the same terms and conditions but by merely increase in rate by 5%, was challenged by one Subhash Acharya in Writ Petition No. 580 of 2007. In that petition grant of extension was challenged on various grounds including that the extension was entirely arbitrary, malafide and was disadvantageous to the State exchequer. The said writ petition was allowed by this court vide judgment and order dated 16th August 2007, wherein the order dated 23rd August 2004 was set aside and the Government was directed to issue fresh tenders.

1. During the pendency of Writ Petition No. 580 of 2007, an application for intervention, being Notice of Motion No. 328 of of 2007 was filed

by other applicants claiming that the extension granted to the petitioner therein was illegal, unsustainable and was in colourable exercise of powers. They also averred that large number of contracts were being similarly extended in the discretion of the authorities in violation of the rules of business and the basic rule of law, and that all should be given an opportunity to participate in the contracts, which the State wishes to enter into with individuals. This application was also taken into consideration while delivering the judgment dated 16th August 2007.

4. During the pendency of the said Writ Petition No. 580 of 2007, the Minister of his own volition issued a show cause notice to the petitioner therein and after hearing the petitioner therein an order dated 11th July 2007 was passed partly justifying his order dated 23rd August 2004 and at the same time directed issuance of fresh tenders and also fixed minimum bid at Rs.1,58,987/-. The order dated 11th July 2007 also stated that the decision for extension of contract dated 23rd August 2004 was for valid reasons and consideration. The said order did terminate the contract with retrospective effect but directed that till new contracting party is selected by the Government by calling for fresh tenders, petitioner therein would continue to have the benefit

of the order of extension. It is this order dated 11th July 2007 which has been challenged by the petitioner herein in the present case. The grievance of the petitioner is that the order dated 11th July 2007 is contrary to the terms on which he was granted extension and in fact takes away his settled right. The petitioner specifically disputed the allegations made in the show cause notice and stated that the subordinate staff in the office of respondent No. 2 was using their power in a biased manner and the action of the Minister in granting extension for a period of 3 years was valid and proper.

5. At this stage it may be appropriate to refer to the relevant paras of the judgment in Writ Petition No. 580 of 2007 dated 16th August 2007, which are as under:

> "15. In relation to contractual matters, the Courts have consistently held that public authority or the State Government should not have unfettered discretion and doctrine of executive necessity has limited application in such actions. In the case of *Sterling Computers Limited* vs. *M/s. M & N Publications Limited and others,* (1993) 1 SCC 445, the Supreme Court held as under.
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> "... ... That is why the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the

norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

13. But in normal course some rules must exist to regulate the selection of persons for awarding contracts. In such matters always a defence cannot be entertained that contract has been awarded without observing the well-settled norms and rules prescribed, on the basis of the doctrine of "executive necessity". The norms and procedures prescribed by Government and indicated by courts have to be more strictly followed while awarding contracts which have along with a commercial element a public purpose as in the present case. The publication of directories by the MTNL is not just a commercial venture; the primary object is to provide service to the people.

14. The action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12 of the Constitution, while awarding contracts in respect of properties belonging to the State can be judged and tested in the light of Article 14 of the Constitution, is settled by the judgments of this Court in the cases of *Ramana Dayaram Shetty v. International Airport Authority of India,* AIR 1979 SC 1628; *Kasturi Lal Lakshmi Reddy v. State of J & K,* AIR 1980 SC 1992;

Fertilzier Corpn Kamgar Union (Regd.),Sindri v. Union of India, AIR 1981 SC 344; *Ram and Shyam Co. v. State of Haryana,* AIR 1985 SC 1147; *Haji T.M. Hassan Rawther v. Kerala Financial Corporation, AIR 1988 SC 157; Mahabir Auto Stores v. Indian Oil Corpn.*, *AIR 1990 SC 1031 and Shrilekha Vidyarthi v. State of U.P. AIR 1991 SC 537.* It has been said by this Court in Kasturi Lal:

> " It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so."

15. There is nothing paradoxical in imposing legal limits on such authorities by courts even in contractual matters because the whole conception of unfettered discretion is inappropriate to a public authority, who is expected to exercise such powers only for public good."

16. The power of the public authorities are, therefore, essentially different from those of private persons. A private person may deal with his properties and rights the way he feels proper, even if to others it may appear ex facie arbitrary. Such relaxation is not available to a public authority much less the government. The Government must exercise its discretion fairly and within the specified limitations. The rules of business of the Government would control its functioning and the persons in high position have to ensure all reasonable care and caution that no loss is caused to the affairs of the Government particularly in terms of money. So far as the rules of business are not offending the statutory Rules, they would be binding and enforceable. Though a Minister would have powers to take decisions in regard to his Department but

if such a decision is taken contrary to the rules of business or is patently arbitrary, the same may not bind the Government. In the case of *Rajureshwar Associates* vs. *State of Maharashtra and others,* (2004) 6 SCC 362, the Supreme Court, while dealing with a somewhat similar situation, where the stand of the Government was different than the stand taken by the Ministry of Textiles and in a subsequent decision the Government cancelled the agreement of sale in favour of the appellant held as under:

"41. Rule 9 provides that all cases referred to in the Second Schedule shall be brought before the Council of Ministers. Entry 15 in the Second Schedule provides that any proposal which affects the finance of the State which does not have the consent of the Finance Minister has to be placed before the Cabinet. Similarly, Entry 17 provides that proposal involving alienation either temporary or permanent by way of sale, grant or lease of government property exceeding Rs. 50,000/- in value of the abandonment or reduction of a recurring revenue exceeding that amount or the abandonment of revenue exceeding Rs. 5 lakhs except when such alienation, sale, grant or lease of government property is in accordance with the Rules or with a general scheme already approved by the Council. It is evident that requirement of these Rules was not complied with at the time when the decision dated 23-10-2000 was taken by the Textile Minister to sell the entire land in favour of the appellant....."

"47. The note of the Chief Secretary sets out the correct approach that the action be taken in accordance with law. But the Minister of Textiles went by the incorrect approach suggested by the Department of Textiles. The decision so taken by the Minister of Textiles and the consequent sanction dated 23-10-2000 is vitiated in law. The sanction so granted cannot be termed in law as the grant of permission by the Government in accordance with the Rules and the procedure prescribed.

48. In the circumstances, when the Chief Minister had occasion to consider the matter when an offer was received from Mr. Save, he was right and justified in directing re-tender. Such direction was in keeping with

the views expressed by the Departments of Revenue and Finance. The matter was considered further after noting that the Chief Minister at various levels including the Legal Department and the final decision was taken on 27-11-2001. This decision, it appears from the file, is on account of the Government's belief that the price of Rs. 7,81,33,000 was an undervaluation of the subject property which is a prime land located within the Corporation area. The Divisional Commissioner, Aurangabad vide his communication dated 8-8-2001 as well as 23-10-2001 brought to the attention of the State Government that the market value of the property was in the range of Rs. 24-25 crores. When the offer of the appellant was received, no valuation of the land had been got done. The liquidator could not have invited tenders for the entire land as out of 43 acres 12 gunthas, 38 acres 12 gunthas had been taken possession of by the Government leaving only 5 acres of land on which buildings had been erected. Initial decision was to sell 5 acres of land along with the building and machinery standing thereon. The Revenue Department as well as the Finance Department had not agreed for the sale of the entire land. The decision was taken by the Textile Department including its Minister to sell the entire land and the matter was required to be placed before the Cabinet and in the absence of any proper sanction the Government had the power to cancel the same especially when it was of the opinion that the price of Rs. 7,81,33,000/- offered by the appellant was undervaluation of the property. The High Court was right in coming to the conclusion that the State Government did not, at any time, give any approval for the sale or disposal of the subject land as was claimed by communication dated 23-10-2000."

While dealing with the aspect of distribution of State largesse or contractual obligations of the State, the principles of public trust and public accountability have to be applied in judicial determination. The State authorities should exercise discretion in awarding contracts but such discretion should be fair and in public interest. They should be free of arbitrariness and nowhere should amount to misfeasance in public office. In the case of *Shivsagar Tiwari* vs. *Union of India and others*, (1996) 6 SCC 558, the Supreme Court while setting aside the

discretionary allotments made by the Minister of Urban Development to his employees, relatives, etc. even directed that this amounted to misuse of duty and awarded exemplary damages as actionable in tort."

32. The reasoning given by Respondent No.6 in his order dated 11th July, 2007, reviewing his earlier decision would not make either of them good in law particularly when the order is impugned in the present writ petition. His own satisfaction reiterating that he had taken the earlier decision on reasonable grounds would not convert the arbitrariness into fairness. There is no dispute on record before us that no tenders were invited for all this period and Respondent No.2 has already enjoyed the benefits of an invalid and arbitrary order passed by Respondent No.6 for a period of more than two years. The order of Respondent No.6 granting extension for a period of three years is devoid of any justification, opposed to the rules of procedure and practice of the Department and ex facie discriminatory. It excluded all others who are desirous of participating in the tender for collection of revenue of the area in question. No efforts were made to timely invite fresh tenders and a conclusion de hors any rationale was arrived at resulting in grant of special favour to Respondent No.2. Such an approach would be unsustainable in law and can hardly be justified on any norms of administrative functioning. The exercise of discretion vested in Respondent No.6 is always circumscribed by proper norms of procedure. In absence of any rationale basis or data, Respondent No.6 arrived at a decision that it was in the interest of the State to grant extension of three years at a nominal increase of 5 per cent, that too while deleting very meaningful term (condition No.5 of the contract) from the new contract. This order can hardly be stated to be in public interest or the State interest. In fact, it is rightly termed as arbitrary even by the State. The element of arbitrariness and discrimination is crystal clear and does not admit any doubt. It is difficult for this Court to accept that the decision of Respondent No.6 dated 11th July, 2007 was for bona fide reasons and in the State interest because the pleading of the parties, the record produced before us, and circumstances of the case

are *risque*. "

34. For the reasons aforerecorded, we allow this writ petition with the following directions.

(i) The order passed by Respondent No.6 dated 21st August, 2004, is hereby quashed and set aside. However, as the order dated 11th July, 2007 passed by Respondent No.6 is not a matter of challenge before us in the present writ petition, we leave the respective parties to take such steps as may be permissible to them in accordance with law.

(ii) The obvious result of setting aside the order dated 21st August, 2004 is that the extension granted to Respondent No.2 by Respondent No.6 is vitiated in law and cannot continue any longer. Thus, we direct the State to invite fresh tenders within one month from the date of pronouncement of this order.

(iii) The Respondent-State shall appoint a Committee to determine the loss caused to the State exchequer, as a result of waiver of condition No. 5 of the original contract, as well as from the order granting extension for a period of three years to Respondent No.2.

However, in view of the above order, we further direct that the computation of loss shall be determined by the Committee for the period from 17th February, 2005 (when the contract period was to expire) till date of passing of this order.

(iv) Founded on the principles of public accountability and public interest, we direct that if any financial loss is determined by the Committee in terms of Clause (iii) above for the extended period, the same shall be recovered from Respondent No.2 who had taken benefit and advantage of the arbitrary order passed by Respondent No.6. The recovery shall be made in terms of the prescribed procedure and in accordance with law.

(v) The loss, if any, suffered by the State on account of unauthorised deletion of condition No. 5 of the original contract, as determined by the Committee, shall be

recovered from Respondent No.6 with effect from the date of deletion till the date of its restoration, in accordance with law.

(vi) In view of the established canons of public administration and decisions of Courts, clearly defining the field of judicial intervention in such matters and with an intention that a greater public purpose and interest is served and to avoid such arbitrary re-occurrence in the matters of State contracts, we consider it proper to issue direction to the State to ensure that no such extension of contracts is granted by its various Departments and instrumentalities in future. However, where it is found necessary in the wisdom of the Competent Authorities to grant such extension, it shall be extended for valid reasons alone, that too to be recorded in writing and after due consultation with concerned Department as also in accordance with Rules of Business, instructions issued by the Government, and in strict adherence to the prescribed procedure.

30. Rule is made absolute in the above terms, while leaving the parties to bear their own costs."

6. From the above findings recorded by the court it is clear that even the Government did not accept the stand of respondent No. 2 in its entirety. The Court had directed issuance of fresh tenders in accordance with the procedure of the Government as also the relevant rules. Once the order dated 23rd August 2004 is set aside in its entirety the question of correctness or otherwise of the order dated 11th July 2007 would hardly remain. Once the very basis of the order is set aside in judicial proceedings, any subsequent order modifying or justifying the said order by the concerned administrative

authority would in no way alter the legal status and effect of the judgment of the court. In other words, the present petition is primarily on academic question. Mere fact that respondent No.2 has attempted to justify the passing of the earlier order, which was noticed by the court, is not substantiated by any data or procedure in accordance with the rules, and would be of no advantage to the petitioner herein. The net result would be that the order dated 11th July 2007 would in fact be non-est and inconsequential unless and until the order of the court dated 16th August 2007 is set aside by the court of competent jurisdiction or is granted status ante as it existed on and prior to the judgment of this court. It has also been stated in the previous order dated 16th August 2007 that the order dated 11th July 2007 has not been accepted by the Government in its entirety. If that be the situation the fate of the order dated 23rd August 2004 would remain to be uncertain even as of date.

7. Under the directions of the court the concerned department has already invited fresh tenders on 19th July 2007 and tenders in fact have been received by the department. In fact the petitioner herein has/not submitted his tender in response to the said tender notice. Thus the present situation is the creation of the petitioner himself.

The stand of the Government is that even prior to the judgment of this court they had invited tenders. The learned Government Pleader appearing for the Government while taking the same stand vide their affidavit dated 27th August 2007 filed by Shri S.Y. Thakare, Deputy Secretary in the office of respondent No.1, as taken by them in Writ Petition No. 580 of 2007 has stated that the notice for fresh tenders issued on 19th July 2007 should be treated as compliance of the judgment of this court dated 16th August 2007. We find no reason not to accept this request. If, during the pendency of the petition the Government invited tenders, no fault could be attributed to the department. In our view it would be substantial compliance of the directions contained in the order dated 16th August 2007. The present petition in fact is not maintainable as the very order which impugned herein is no more in existence and has been quashed by a judicial order.

8. With the above observations we dismiss the present writ petition while leaving the parties to bear their own costs. Rule stands discharged.

CHIEF JUSTICE

DR.D.Y.CHANDRACHUD, J.